



REPUBLIC OF KENYA



**Rev. Francis Mwangi Mwaura (Being Sued as a Pastor and the Trustee
of Deliverance Church Lanet) & another v Odanga (Civil Case
295 of 2012) [2024] KEHC 3166 (KLR) (26 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 3166 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL CASE 295 OF 2012
SM MOHOCHI, J
MARCH 26, 2024**

BETWEEN

**REV. FRANCIS MWANGI MWAURA (BEING SUED AS A PASTOR AND THE
TRUSTEE OF DELIVERANCE CHURCH LANET) 1ST APPLICANT**

MICHAEL C. KORIR 2ND APPLICANT

AND

PETER REUBEN OREMO ODANGA RESPONDENT

RULING

1. Before Court for determination is the Notice of Motion dated 23rd of November 2023, filed Pursuant to Section 3A, 63 (e) of the *Civil Procedure Act* and all other enabling provisions application for Orders:
 - i. Spent
 - ii. Spent
 - iii. That, the honourable Court be pleased to stay execution of the Respondent bill of cost pending the taxation of the Applicant bill of cost and the hearing and full determination of the suit herein.
 - iv. That, upon staying execution thereto, the Applicant to either deposit the taxed costs with Court or in a joint account with counsels.
 - v. That, the costs of this application be provided for.
2. The Application fortified by supporting affidavit of Francis Mwangi Mwaura and is premised on following grounds on the face of the Motion;
 - i. That, the suit herein was initially dismissed /struck out for want of prosecution;



- ii. That the Applicants were granted costs arising out of the same dismissal.
 - iii. That, the Applicants on following up their costs for taxation, the Court file could not be traced at all for reason best known to the Respondent;
 - iv. That, when the appeal was dismissed, the Appellate Court ordered the hearing of this suit afresh so that the issue of limitation of time could be determined in the hearing.
 - v. That, the said judgment granted the Respondent costs which costs were assessed at Kshs 596,896/.
 - vi. That, the Respondent is now at the verge of execution for his costs.
 - vii. That, given that the Applicants are yet to tax their bill of costs it will only be fair and just that the Respondent does hold his horses so that;
 - a. Our bill is taxed;
 - b. We decide on who owes you after the Applicant has been taxed;
 - c. The suit is equally heard and determined so that the Applicant are to tell who has carried the day.
 - viii. That, should execution proceed, the Applicant stand to suffer losses
 - ix. That, the only open avenue left is to allow the Applicant's Application
3. Directions were issued on the 28th November 2023 'to wit';
- a. A temporary Stay of Execution of taxed bill of costs is hereby issued pending determination of this Application.
 - b. The Applicant shall file a return of service.
 - c. The Applicant shall serve the Application dated 23rd November 2023, upon the Respondents, within three (3) days and not later than, Wednesday the 22nd November 2023.
 - d. The Application, shall be mentioned inter-parte on the 5th of December 2023, for further directions
4. The Applicants filed a Return of Service by Aggrey J. Simiyu dated 28th November 2023 demonstrating service upon the Advocates for the Respondent who opposed the Application by filing a replying affidavit dated 8th of January 2024.

The Applicants Case

- 5. The Applicants wish to rely on the supporting affidavit of Reverend Francis Mwangi Mwaura and the 2nd Applicant's Written Submissions filed on the 4th December 2023.
- 6. The Applicants beseech the Court to for prayers 3 and 4 of the Notice of Motion dated 23rd November 2023. and state the following:
 - a. Firstly, that the 2nd Applicant is a reverend and a trustee of the Deliverance Church Nakuru located at Free Area within Nakuru county.
 - b. Secondly, that way back in the year 2012 or thereabout, the Respondent started interfering with the smooth running of the 2nd Applicant's church on ground



that the church was using his parcel of land which parcel of land was right in front of the church premises and the same was solely being used for parking purposes."

7. That when the Respondent pressure was so much on the 2nd Applicant's church, the 2nd Applicant herein mounted a Civil Suit Number 164 of 2012 against the Respondent whereupon an injunctive relief was granted by this Court to stop the Respondent from interfering with the church smooth operation.
8. In between, the church got to know the 1st Applicant who happened to be the original and legal owner of the parking bay/ leeway that the Respondent herein was laying claim over.
9. That, Mr. Michael's position was that the Respondent had breached the initial agreement between himself and the Respondent herein hence the land in question was sold to the church and the full purchase price was paid.
10. That when the Respondent learnt of that transaction he instituted the current suit. As a matter of eliminating a multiplicity of suits before this Court, the two suits viz, 164 of 2012 and 295 of 2012 were consolidated.
11. That counsel for the 1st Applicant raised a preliminary objection on the legality and existence of Respondent's suit on grounds that it was time barred.
12. The suit herein was struck out on the same said grounds and parties herein were awarded costs.
13. As fate will have it, the Applicant herein for unknown reasons were never able to access this Court file for purpose of assessing their costs.
14. The Respondent mounted an appeal and the Appellate Court's verdict was to the effect that the suit be heard on its merit and issue of limitation of time be raised in the hearing.
15. They were thus awarded costs and now we are here being executed with a whole kshs 596,896/- as costs.
16. The Applicants simple prayer is that, the two consolidated suits have not been heard to their conclusion and the Applicants are yet to tax their cost.
17. That, the Court is flowered with the will discretion of granting the prayers sought so that one party is not seen pulling a fast one against the other and that no prejudice will be occasioned to the Respondent herein should the prayers sought be granted.

Respondent's Case

18. The Respondent did not file written submissions but elected to file a Replying Affidavit dated 8th of January 2024, contending that, the instant application is a delaying tactic made in bad faith that is misconceived, incompetent, lacks merit and an abuse of the Court process and ought to be dismissed with costs.
19. That, the application is an attempt by the defendants to stop him from enjoying the fruits of the Court of Appeal Judgement dated 29th January 2021 in his favour hence an abuse of the Court process. Consequently, set-aside the trial Court's ruling dated 17th September 2013 and substitute therefore an order directing that the suit that gave rise to the impugned ruling be set down for hearing and determination on its merit. The matter shall be heard before any judge of the Environment and Land Court in Nakuru other than L. N. Waithaka, J. and that the Respondents shall bear the costs.



20. That, the import of the Court of Appeal holding is that, the Orders of the High Court dated 17th September 2013 were set aside. And it came as a shock to him that the Applicant can move this Court to seek an order of stay of execution on the basis of orders that were set aside and no longer operative. And that, the Application is a big joke as the Applicant is moving the High Court to Stay the Judgement of the Court of Appeal.
21. That, it is trite law the High Court lacks jurisdiction to reverse a decision of the Court of Appeal as it lacks the jurisdiction to supervise superior Courts. And that, it is unthinkable that the Applicant can fathom that the High Court can grant orders staying the decision of a Court of Appeal and that the Application is an attempt to derail the Court process since the Applicant has not been able to satisfy the conditions outlined in *RWW v EKVV* [2019] in which the Court stated that:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the Court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The Court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs. Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”
22. That, the instant application has not met the above conditions for stay of execution, while it will be extremely prejudicial to the Respondent to stay execution on the basis of orders that were set aside the Applicant has not shown how they will suffer prejudice should the application be dismissed.
23. That, it is therefore imperative that this Court dismisses the instant application not deprive him of the fruits of my Judgment and that the application is brought pursuant to Sections 3 and 3A of the *Civil Procedure Act* which provides for the special jurisdiction and inherent powers of Court but is not a license for the applicant delay the Court process.
24. That, the Applicants have made baseless allegations that this particular file grew legs and hands and that, the trite law under Section 109 of the *Evidence Act* is the burden of proof as to that fact lies on the applicants and the same has not been discharged. In light of the above the applicant's application is therefore incompetent and should be struck out with costs as it is based on orders that were set aside.
25. That, it is in the interest of justice that the application herein by the applicant be struck-out and/or dismissed in its entirety.

Analysis and Determination

26. The Court has considered the Application, the response thereto and the submissions on record and the issues for determination is
 - i. Whether this Court has jurisdiction to entertain the instant application?
 - ii. whether the Application is merited to grant an order of stay of execution pending appeal.
27. This Court is to first decide if it has jurisdiction to handle the Application. Since this issue has been raised, I can do no more than resolve before others. This is because jurisdiction goes to the root of every decision of the Court.



28. In the seminal case of *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] KLR 1 Nyarangi JA held as follows: -

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”.

29. Then, in the more recent decision of *Samuel Kamau Macharia v Kenya Commercial Bank & 2 Others*, Civil Appl. No. 2 of 2011, the Supreme Court observed that:

“A Court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings...Where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation.”

30. From the two authorities cited, it is clear that without jurisdiction, if this Court embarks on making any decision it will be engaging in exercise that is a nullity. For that reason, it is vital for the Court satisfy itself that it is seized of jurisdiction.

31. First and foremost, before deliberating on whether there was compliance with the parameters set for grant of such orders as sought in the motion, the Respondent has questioned the Court’s jurisdiction to entertain the instant application on the ground that the matter was ordered heard by the Environment and Land Court.

32. The Applicants were privy to the jurisdictional aspect of the Court of Appeal judgment and as such purporting to seek interlocutory reliefs in the high Court was ingenious at best.

33. It can therefore be rightly said that this Court lacks jurisdiction. This Court therefore finds that the application is improperly before Court and this Court is not vested with appropriate jurisdiction to deal with the same.

34. For the reasons I have set out above, I find the Notice of Motion dated 23rd of November 2023 improperly before this Court and the same is accordingly struck out.

It is so Ordered.

SIGNED, DATED AND DELIVERED AT NAKURU ON THIS 26TH DAY OF MARCH 2024.

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MOHOCHI S. M.

JUDGE

